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FILED
JAN 26 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-729

IN THE

Supreme Court of the United States

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, AND JOEL A. MIELE, SR., COMMISSIONER OF DEPARTMENT OF ENVIRONMENTAL PROTECTION.

Petitioners,

v.

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., RIVERKEEPER, INC., STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, AND ERIN M. CROTTY, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR NEW YORK STATE RESPONDENTS

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the permit requirement of the federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (the "Clean Water Act"), which places controls on pollutant discharges and is triggered by "any addition of any pollutant to navigable waters from any point source," applies when a point source conveys water containing pollutants from one distinct water body to another in circumstances where the receiving water body would not otherwise be burdened with additional pollutants but for the transfer through the point source.

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STATEMENT

1. Congress adopted the Clean Water Act ("CWA" or "the Act") "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The national goal of the Act is "to achieve 'water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.'" *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 126 S.Ct. 1843, 1852 (2006) (quoting 33 U.S.C. § 1251(a)(2)). To serve these ends, the CWA prohibits the discharge of any pollutant by any person unless done in compliance with some provision of the CWA. 33 U.S.C. § 1311(a).

At issue here is the scope of the CWA's National Pollutant Discharge Elimination System ("NPDES") permit requirement, 33 U.S.C. § 1342(a), (b), which is the "primary means" for protecting and improving water quality within the "comprehensive regulatory regime" established by Congress. *Arkansas v. Oklahoma*, 503 U.S. 91, 99, 101 (1992). The NPDES requires a permit for the "discharge of any pollutant" from a "point source" into "navigable waters." 33 U.S.C. §§ 1311(a), 1342(a)-(b), 1362(6), (7), (12), (14); *see also* 40 C.F.R. § 122.1(b). "[D]ischarge of a pollutant" is defined in pertinent part as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). "Point source," in turn, is defined as "any discernible, confined and discrete conveyance, including but not limited to any . . . tunnel . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials,

heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste . . . ." 33 U.S.C. § 1362(6). "The term 'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

An NPDES permit sets forth the conditions for the discharge of pollutants consistent with various other provisions of the CWA, including the requirement that pollutant limitations be set so as to assure that each receiving water will achieve or continue to achieve the "water quality standards" applicable to the receiving water. 33 U.S.C. §§ 1311(b)(1)(C), 1313(a)-(c); 40 C.F.R. § 122.44(d)(1). "Water quality standards" consist of two major elements: (i) "the designated uses of the navigable waters involved"; and (ii) "the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.10, 131.11.

The United States Environmental Protection Agency ("EPA") or a delegated State must establish the designated use, "tak[ing] into consideration the use and value" of each water body "for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation." 40 C.F.R. § 131.10(a). The CWA further requires States to assess their waters and identify individual waters that have not achieved compliance with water quality standards, despite controls contained in the applicable NPDES permit. 33 U.S.C. §§ 1313(d)(1)(A)-(B), 1315. For each noncompliant body, the EPA or delegated State must develop water pollution budgets and remedial pollutant loading allocations, known as "total maximum daily load[s]" ("TMDLs"), to identify both piped ("point") and

diffuse ("nonpoint") sources of excessive pollutants that cause the contravention of water quality standards. 33 U.S.C. § 1313(d)(1)(C), (D); 40 C.F.R. § 130.7. Once established, the pollutant loading reductions assigned to point sources in the TMDL process are generally incorporated as more stringent limitations within the relevant individual NPDES permits. 33 U.S.C. § 1313(d); 40 C.F.R. § 122.44(d)(1)(vii); *see S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 107 (2004).

2. As part of its system for delivering drinking water to New York City and the surrounding area, the City maintains the Schoharie Reservoir in the Catskill Mountains. Water is discharged from the Schoharie Reservoir, diverted through the 18-mile Shandaken Tunnel, and discharged into the Esopus Creek, a trout stream used for fly fishing and other recreational activities. Pet. App. A5-A6.[1] The Creek's water, in turn, flows through a series of reservoirs, aqueducts, and tunnels until it eventually reaches New York City. "Absent the man-made diversion through the [Shandaken] Tunnel, water from the Schoharie Reservoir would never reach the Esopus Creek." Pet. App. A6. "Because water in the Schoharie Reservoir contains suspended solids from both natural and man-made causes, discharges from the Tunnel into the Creek are more turbid than the waters of the Esopus." Pet. App. A26. "This turbidity impairs use of the Esopus for fly fishing and other recreational activities." Pet. App. A6. Also, "discharge from the Shandaken Tunnel periodically contains elevated temperatures that stress trout populations in Esopus Creek." Pet. App. A28.

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[1] "Pet. App." refers to the Appendix to Petition for a Writ of Certiorari.

3. Catskill Mountains Chapter of Trout Unlimited, Inc. and other recreational users of the Esopus Creek ("Private Party Respondents") brought this citizens' suit alleging that Petitioners had violated the CWA by discharging pollutants into "waters of the United States" without an NPDES permit. Pet. App. A4.

The district court dismissed the complaint for failure to state a claim, holding that because there was no evidence that Petitioners "added anything to the water in the Reservoir before releasing it through the Shandaken tunnel," Private Party Respondents failed to establish that Petitioners' "diversion of water from the Schoharie Reservoir to Esopus Creek through the Shandaken tunnel constitutes an 'addition' of pollutants 'from' a point source." Pet. App. A38-A39.

The Court of Appeals reversed ("*Catskill Mountains I*"), holding that Petitioners' conveyance of water that contains pollutants from the Schoharie Reservoir through the 18-mile-long Shandaken Tunnel and into the Esopus Creek requires a permit. Pet. App. A60. It explained that "the transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and thus a 'discharge' that demands an NPDES permit." Pet. App. A71. The court rejected Petitioners' reliance on the cases involving the recirculation of water held back by a dam as factually distinguishable from this case because here, the Schoharie Reservoir and the Esopus Creek are hydrologically distinct and thus water and any pollutants from one are an "addition" to the other; in contrast, in the dam context, water is taken from a water source and released back into that same source, and thus the water and pollutants are not an "addition." Pet. App. A71-A73. The court analogized the "dams cases" to pouring a ladle of soup back into the same pot, in which

case "one has not 'added' soup or anything else to the pot." Pet. App. A72.

The Court of Appeals also rejected Petitioners' "singular entity" theory of navigable waters, which posits that "an addition to one water body is deemed an addition to all of the waters of the United States." Pet. App. A75.

> Such a theory would mean that movement of water from one discrete water body to another would not be an addition even if it involved a transfer of water from a water body contaminated with myriad pollutants to a pristine water body containing few or no pollutants. Such an interpretation is inconsistent with the ordinary meaning of the word "addition."

Pet. App. A75. Finally, the court rejected Petitioners' arguments from the CWA's broad purposes and structure: "Where a statute seeks to balance competing policies, congressional intent is not served by elevating one policy above the others, particularly where the balance struck in the text is sufficiently clear to point to an answer." Pet. App. A76.

On remand from *Catskill Mountains I*, the district court granted partial summary judgment for Respondents with respect to liability and, after a bench trial, imposed civil penalties and ordered Petitioners to seek a permit promptly. Pet. App. A83, A118, A122. The court joined State Respondents as third-party defendants and ordered them to process the permit application in a timely fashion. Pet. App. A122.

On appeal from the district court's remedial order, Petitioners challenged the amount of the civil penalty and sought to reargue liability. On June 13, 2006, the Court of Appeals reiterated its holding from *Catskill Mountains I* that an NPDES permit is required for the interbasin transfer of polluted water under the plain language of the CWA. Pet. App. A23 ("*Catskill Mountains II*"). The court rejected Petitioners' argument that a different result was required by this Court's decision in *Miccosukee*, 541 U.S. at 109-10, because in *Miccosukee*, the Court did not eliminate the distinction between inter- and intrabasin transfers, and even cited with approval the Second Circuit's "soup ladle" analogy. Pet. App. A12. Nor did the Court of Appeals find persuasive, applying the degree of deference appropriate under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the 2005 EPA interpretation cited by Petitioners concluding that the NPDES permit requirement is inapplicable to interbasin water transfers. Pet. App. A12-A15 & n.5; *see also* Pet. App. A205-A237. Finally, the court found Petitioners' "plea for reconsideration" based on the assumption that regulating the discharge "would effectively require that the flow be stopped altogether" to be "exaggerated." Pet. App. A16. The court provided a "detailed and technical accounting" of the flexibility built into the NPDES permit scheme. Pet. App. A16-A19.

Petitioners' request for rehearing and rehearing *en banc* was denied on August 25, 2006. Pet. App. A141.

4. On June 7, 2006, the EPA issued a Notice of Proposed Rulemaking embodying the legal analysis in the EPA's 2005 legal memorandum. Pet. App. A182. As of this date, the EPA has not acted to finalize the Proposed Rule.

5. Effective September 1, 2006, Respondent New York State Department of Environmental Conservation ("DEC") issued a CWA permit to the New York City Department of Environmental Protection with respect to the discharge from the Shandaken Tunnel into the Esopus Creek. Pet. 13.[2] *See* N.Y. State Dep't of Envtl. Conservation, *State Pollutant Discharge Elimination System Discharge Permit*, No. NY-0268151 ("SPDES Permit"). Petitioners have not challenged any aspect of this permit.

REASONS FOR DENYING THE PETITION

The Court of Appeals correctly held that interbasin transfers of polluted water require a permit under the CWA, and that decision does not warrant this Court's review. Petitioners seek a writ of certiorari to correct a supposed error in interpreting the CWA, despite acknowledging that the EPA – the agency charged with interpreting the Act – has initiated rulemaking on the very topic of whether water transfers are subject to the CWA permitting process. There is thus a distinct possibility that any decision by this Court would be called into question following publication of a final rule. Nor do Petitioners identify a circuit conflict or any other reason to invoke this Court's jurisdiction. The Second Circuit's decision is fully consistent with those of this Court, the First, Ninth, and Eleventh Circuits, as well as the two state appellate courts to have addressed the question. In the face of this consistent body of case law, Petitioners argue that this case merits review because of its unique factual context – the movement of water for drinking, as opposed to for commercial or industrial use. Pet. 15. Petitioners present a factual distinction without legal significance.

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[2] "Pet." refers to the Petition for a Writ of Certiorari.

1. Petitioners seek to support their request for review by pointing to the EPA's proposal to exempt interbasin transfers from the NPDES permit requirement, but the fact that the regulatory setting for this case is in flux is a primary reason to *deny* review here. While the proposed rule was published on June 7, 2006, and the comment period closed July 24, 2006, a final rule is still pending. Pet. App. A171. If a final rule issues at all, the rule itself or its legal rationale may be substantially revised as the rulemaking process moves forward. This change could occur during, or even after, Court review. It would be premature for the Court to accept review of this case on the promise of a regulatory change that may not materialize.

Moreover, if the EPA does complete formal notice and comment rulemaking, certiorari review of this case may turn out to be futile because a decision by the Court interpreting the scope of the CWA permitting process could be supplanted, or at least called into question, by the formal agency rule. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 125 S.Ct. 2688, 2700 (2005). Given the prospect of formal agency action, prudential principles of judicial economy make this case a particularly poor vehicle for certiorari. *Cf. Quinn v. Muscare*, 425 U.S. 560, 563 (1976) (writ of certiorari dismissed due to, inter alia, a subsequent change in the challenged municipal regulation); *Morris v. Weinberger*, 410 U.S. 422, 422 (1973) (writ of certiorari dismissed due to congressional amendment of relevant statutory provisions); *see also Brand X*, 125 S.Ct. at 2719-20 (Scalia, J., dissenting) (discussing the unseemliness of a Supreme Court decision being overruled by an agency acting through formal rulemaking).

Finally, the Court of Appeals did not depart from routine application of established agency deference principles, as Petitioners repeatedly suggest. *See* Pet. i, 4, 14, 27-30. The proposed rule was issued by the EPA some six months after this matter was argued and submitted to the Second Circuit, and a week before the court rendered its decision. Pet. App. A2, A171. While the court did not specifically address that eleventh-hour preliminary rulemaking, it did discuss the August 5, 2005, agency interpretation on which the proposed rule was based. Pet. App. A181-A182; A205-A237 ("Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers"). The court reviewed the agency interpretation, Pet. App. A12-A15, correctly applied *Skidmore* deference as Petitioners conceded, Pet. App. A11, and held that "we do not find the argument persuasive and therefore decline to defer to EPA." Pet. App. A12 n.5. Because neither the proposed rule nor the agency interpretation are embodied in final, formal notice and comment rulemaking, neither is entitled to more than *Skidmore* deference. *See United States v. Mead Corp.*, 533 U.S. 218, 227-38 (2000). Finally, the Court of Appeals had the opportunity to consider the proposed rule, upon Petitioners' invitation to rehear the case.[3]

2. This petition presents no conflict with any decision of this Court nor any split of authority among the circuits. Every court to consider the issue has agreed with the Court

[3] The only other court to have reviewed the EPA's proposed rule and agency interpretation rejected them (and held that an interbasin transfer required a NPDES permit) on the grounds that the EPA's positions were inconsistent with the "unambiguous" terms of the CWA. *Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist.*, No. 02-80309-civ, 2006 WL 3635465, at *34-*36, *42-*48 (S.D. Fla. Dec. 11, 2006).

of Appeals in this case. *See Dubois v. United States Dep't of Agric.*, 102 F.3d 1273, 1296-99 (1st Cir. 1996); *N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155, 1163 (9th Cir.), *cert. denied*, 540 U.S. 967 (2003); *Miccosukee*, 280 F.3d 1364, 1368-69 (11th Cir. 2002), *vacated and remanded*, 541 U.S. 95 (2004).[4]

a. No court has ever held that the transfer of pollutants from one distinct body of water to another is exempt from the NPDES permit requirement. In *Dubois*, a First Circuit case, a ski area sought to pump water from the East Branch of the Pemigewasset River up into Loon Pond, a high-altitude water body considered to be "unusual for its relatively pristine nature" and which served as a drinking water supply. 102 F.3d at 1277-78. New Hampshire classified Loon Pond "as a Class A waterbody, protected by demanding water quality standards under a variety of criteria." *Id.* The East Branch, by contrast, was "a relatively unprotected Class B waterway." *Id.* at 1279. The First Circuit took judicial notice that for years the East Branch was "one of the most polluted rivers in New England." *Id.* at 1297. Because East Branch water, which otherwise would not have flowed into Loon Pond, *id.* at 1297, contained "bacteria, other aquatic organisms such as Giardia lambia, phosphorus, turbidity and heat," *id.* at 1278, the First Circuit held that an NPDES permit was required for the transfer, *id.* at 1296-99. The court

[4] The state appellate courts that have reviewed this issue have reached the same conclusion as did the Court of Appeals in this case. *See Del-AWARE Unlimited, Inc. v. Commonwealth of Pa. Dep't of Envtl. Res.*, 508 A.2d 348, 359 (Pa. Commw. Ct.), *appeal denied*, 523 A.2d 1132 (Pa. 1986); *cf. People to Save the Sheyenne River, Inc. v. North Dakota Dep't of Health*, 697 N.W.2d 319, 323-25 (N.D. 2005) (holding that a state-issued NPDES permit for the interbasin transfer of polluted water must comply with various provisions of the CWA).

concluded that "[t]he proposed transfer of water from one [body of water] to the other constitutes an 'addition.'" *Id.* at 1299. The EPA itself issued an NPDES permit in response to *Dubois*. Pet. App. A208 n.4.

In *Northern Plains*, a company extracted methane gas and, in the process, drew large quantities of deep groundwater to the surface. 325 F.3d at 1158. The company did not add any chemicals to the groundwater before dumping it into the Tongue River. *Id.* In its "natural state," however, the water contained suspended solids, calcium, magnesium, sodium, potassium, bicarbonate, carbonate, sulfate, chloride, fluoride, aluminum, arsenic, barium, beryllium, boron, copper, lead, iron, manganese, strontium, and radium. *Id.* Further, the groundwater was "salty," raising concerns by those using the Tongue River for agricultural irrigation that the salt would break down the soil structure on farms and ranches. *Id.* The Ninth Circuit held that an NPDES permit was required under the "plain language" of the CWA. *Id.* at 1160.

> Were we to conclude otherwise, and hold that the massive pumping of salty, industrial waste water into protected waters does not involve discharge of a 'pollutant,' even though it would degrade the receiving waters to the detriment of farmers and ranchers, we would improperly undermine the integrity of [the CWA's] prohibitions.

Id. at 1162 (internal quotation marks omitted).

The Eleventh Circuit in *Miccosukee* similarly held that the transfer of polluted water from one distinct water body into another would constitute an addition that triggers the

CWA's permit requirement. 280 F.3d at 1366, 1368-69; *see also id.* at 1368 n.5. This Court subsequently reversed summary judgment and remanded for further fact finding on whether the bodies of water at issue – a drainage canal and an impoundment area in the Everglades – are really two distinct bodies of water, or are instead two parts of the same water body. *Miccosukee*, 541 U.S. at 112. Here, all parties agree that the Schoharie Reservoir and Esopus Creek are hydrologically distinct water bodies. The decision below, therefore, is fully consistent with this Court's opinion in *Miccosukee*.

This Court in *Miccosukee* declined to rule on the South Florida Water Management District's so-called "unified waters" (or "singular entity") theory of navigable waters because it had not been raised below. *Id.* at 109. The theory, also pressed by Petitioners here as a reason to grant certiorari (Pet. 17-19 & nn.13-15), posits that all waters of the United States are a unified whole that may be freely mixed without NPDES implications. *See Miccosukee*, 541 U.S. at 105-09. While not deciding the issue, the Court in *Miccosukee* did raise a number of pointed concerns about this theory. The Court questioned whether it would be proper to place a water transfer from a "polluted" water body to one that is "pristine" outside the scope of the NPDES program, *id.* at 106, as well as whether this legal theory is valid in light of NPDES provisions of the CWA that appear to "protect[] individual water bodies as well as the 'waters of the United States' as a whole," *id.* at 107 (citing 33 U.S.C. §§ 1313(c)(2)(A), 1313(d)). *Miccosukee* also discussed one EPA-promulgated NPDES regulation that "appears to address the movement of pollutants among water bodies, at least at times." *Id.* at 107-08 (citing 40 C.F.R. § 122.45(g)(4)).

The United States originally presented its "unitary waters" theory to the *Miccosukee* Court in a brief *amicus curiae*, *id.* at 105-06, and represented that its approach was the "longstanding EPA view," *id.* at 107. The Court was unpersuaded on this point,[5] and notably, the EPA did not rely on the theory in its subsequent interpretation and rulemaking on water transfers. Pet. App. A171-A204, A205-A237. Considering the skepticism expressed by this Court as to both the substance and the pedigree of the "unitary waters" theory, the fact that no court has adopted the theory and a number have rejected it,[6] and that the United States itself seems to have abandoned it, it can hardly be considered an issue worthy of this Court's attention.

b. The "dams cases" relied upon by Petitioners are not in conflict with this case. Pet. App. A8-A9, A11, A71-A73. These cases, *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), and *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), held that discharges of water containing pollutants from dams which re-circulated the same water into the same water body through a pump storage facility or sent water down stream within the same watershed did not require an NPDES permit. A key premise of the *Gorsuch* and *Consumers Power* decisions was the "sameness" of the water and water body – as in something may not be "added" to itself – a premise that may not reasonably be stretched to encompass polluted water transfers between

[5] The *Miccosukee* Court noted that the Department of Justice had failed to "identify any administrative documents in which EPA has espoused that position." 541 U.S. at 107. Further, the Court remarked that an *amicus* brief filed by several former EPA officials had argued "that the agency once reached the opposite conclusion." *Id.*

[6] *See, e.g., Dubois*, 102 F.3d at 1296-97 (rejecting the singular entity theory).

completely distinct water bodies. Pet. App. A71-A73. The Court of Appeals in *Catskill Mountains II* expounded the important distinction between the intrabasin transfers in the dams cases and the interbasin transfers at issue here:

> [*Gorsuch* and *Consumers Power*] held that water taken from a water source and then released back into that same source was not an "addition" to navigable waters under the CWA, despite the fact that the water so released contained "pollutants." This case differed from the dams cases . . . because the Tunnel discharges water into the Creek from a source that is a different, distinct body of water . . . . [W]e analogized the dams cases to a soup ladle scooping soup out of a pot and returning it to that pot, a type of water transfer known as an intrabasin transfer. The Tunnel's discharge, in contrast, was like scooping soup from one pot and depositing it in another pot, thereby adding soup to the second pot, an interbasin transfer.

Pet. App. A8-A9 (citations omitted). As the court further explained, "despite the presence of pollutants in both interbasin and intrabasin transfers, interbasin transfers are properly distinguished [from those in *Gorsuch* and *Consumers Power*] because they 'add' pollutants to the navigable waters." Pet. App. A11.

The Court in *Miccosukee* did not discuss or cite the dams cases, indicating their lack of relevance to the question of whether NPDES permits are required for interbasin transfers. The *Miccosukee* Court, however, did favorably cite the

Catskill Mountains I "soup ladle" analogy and the distinction between inter- and intrabasin transfers. 541 U.S. at 109-10. The Court remanded the case to the district court to determine whether the water bodies in question were "two pots of soup, not one." *Id.* at 112; *cf. S.D. Warren*, 126 S.Ct. at 1850 n.6. This remand would be unnecessary if there were no legally significant distinction between inter- and intrabasin transfers.

The important distinctions between inter- and intrabasin transfers recognized by both *Miccosukee* and the court below completely undercut Petitioners' reliance on *Gorsuch* and *Consumers Power* for a circuit split.[7] In fact, the EPA itself, in its agency interpretation, was careful to distinguish between inter- and intrabasin transfers. *See* Pet. App. A235 n.18.

c. Petitioners' remaining legal contentions similarly amount to no more than a series of requests for individualized error correction, and with respect to these, too, the decision of the Court of Appeals is entirely consistent with the precedent of this and other courts. For example, Petitioners assert, Pet. 22-27, that the court below erred when it held that a provision of the CWA with respect to state allocations of *quantities* of water does not obviate the NPDES permit requirement with respect to water *quality*. Pet. App. A13-A14; *see* 33 U.S.C. § 1251(g). Petitioners also cite to a provision of the CWA which provides that nothing in the

[7] Petitioners wrongly imply, Pet. 18, that a conflict arises from *United States v. Law*, 979 F.2d 977, 978 (4th Cir. 1992), *cert. denied*, 507 U.S. 1030 (1993), and *Committee to Save Mokelumne River v. East Bay Municipal Utility District*, 13 F.3d 305, 307 (9th Cir. 1993), *cert. denied*, 513 U.S. 873 (1994). These cases merely held that an NPDES permit is required for the discharge of mine wastes from a waste detention impoundment to a creek.

Act should impair any right of the "States with respect to the waters . . . of such States." 33 U.S.C. § 1370(2). The Second Circuit's decision is, however, consistent with the holdings of this Court and the one other circuit to address this issue. In *PUD No. 1 v. Washington Department of Ecology*, this Court held that "[s]ections 101(g) [33 U.S.C. § 1251(g)] and 510(2) [33 U.S.C. § 1370(2)] preserve the authority of each State to allocate water quantity as between users; they *do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation.*" 511 U.S. 700, 720 (1994) (emphasis added); *see also Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 513 (10th Cir. 1985) ("[W]here both the state's interest in allocating water and the federal government's interest in protecting the environment are implicated, Congress intended an accommodation. Such accommodations are best reached in the individual permit process."). Putting aside the fact-bound state law issue of whether an "allocation" even exists here, there is no conflict among the courts on this legal issue.[8]

Similarly, Petitioners assert error on the part of the court below due to its holding, Pet. App. A14, that a provision of the CWA dealing with nonpoint pollution, 33 U.S.C. § 1314(f)(2), does not limit the NPDES requirement as it relates to point source discharges. Pet. 21-22. The Second Circuit's position, however, is consistent with the holding of this Court in *Miccosukee* that "§ 1314(f)(2)(F) does not

[8] Petitioners seek to distinguish between interbasin transfers that involve drinking water and polluted water transfers for other purposes. Pet. 15. As they did before the court below, however, Petitioners provide no explanation under the CWA, or any other statute, as to why the NPDES program would treat transfers involving drinking water differently from any other water transfers. *See* Pet. App. A15.

explicitly exempt nonpoint pollution sources from the NPDES program if they *also* fall within the 'point source' definition" of the CWA. 541 U.S. at 106. Similarly, in *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979), the Tenth Circuit held that § 1314(f)(2) does not create nonpoint source exemptions from the Act's NPDES requirement: "Mining and other categories listed in § 1314(f)(2) may involve discharges from both point and nonpoint sources, and those from point sources are subject to regulation." Indeed, the EPA admits that "[m]ere mention of an activity in section 304(f) [33 U.S.C. § 1314(f)] does not mean it is exclusively nonpoint source in nature." 71 Fed.Reg. 32887, 32890 (June 7, 2006) (citing *Miccosukee*, 541 U.S. at 106).[9] Thus, there is no conflict here either.[10] And one circuit court has specifically approved a TMDL pollutant reduction budget for sediment that was developed by the EPA pursuant to the CWA. *See Prosolino v. Nastri*, 291 F.3d 1123, 1126-27, 1129-30 (9th Cir. 2002), *cert. denied*, 539 U.S. 926 (2003).

Petitioners also make the perplexing assertion that the Court of Appeals "ignored the plain language of the statute,"

[9] Pet. App. A185 inaccurately quotes this language from the Federal Register.

[10] Petitioners also assert that turbidity and sediment are not "pollutants" under the CWA. Pet. 20. This issue, however, was not presented to the court below and, thus, cannot serve as a basis for a grant of certiorari. See Pet. App. A6 n.1 ("The parties do not contest that turbidity qualifies as a pollutant under the CWA."). In any event, Petitioners' assertion is not only meritless, but absurd. The EPA has developed an entire protocol on how to establish sediment TMDLs under the CWA, *see http://www.epa.gov/owow/tmdl/sediment/pdf/sediment.pdf* (last visited Jan. 25, 2007), and has listed numerous examples of EPA-approved TMDLs for water bodies impaired by sediment pollution, *see http://www.epa.gov/owow/tmdl/examples/sediment.html* (last visited Jan. 25, 2007).

Pet. 21, even though both decisions below were expressly based on the plain text of the CWA and, in particular, the meaning of the term "addition." Pet. App. A15, A73. Indeed, the Court of Appeals' method of statutory construction was fully consistent with that recently undertaken by this Court when interpreting terms from the CWA that are "neither defined in the statute nor a term of art" so that they are given their "ordinary or natural meaning." *S.D. Warren*, 126 S.Ct. at 1847 (interpreting "discharge" in the CWA according to its "ordinary or natural meaning").

3. Finally, Petitioners assert that review is appropriate because the Second Circuit's decision will "wreak havoc" on traditional water management functions. Pet. 14, 25-27. After carefully reviewing similar claims raised by Petitioners below, the Court of Appeals correctly called them "exaggerated," and "alarmist and unwarranted." Pet. App. A16, A18. The NPDES permitting process contains flexible administrative mechanisms and variance procedures to assure that important water transfers occur as measures to appropriately control pollutant discharges are implemented. Pet. App. A16-A18. To the extent there is any basis for Petitioners' generalized concerns, they are best addressed within the individualized permitting process itself, as was done here.

As the Court of Appeals concluded after a detailed examination of this issue: "We think the flexibility built into the CWA and the NPDES permit scheme . . . will allow federal authority over quality regulation and state authority over quantity allocation to coexist without materially impairing either." Pet. App. A16. Indeed, DEC issued a CWA permit to Petitioners for the Shandaken Tunnel discharge, Pet. 13, and while Petitioners had an opportunity to challenge

the terms of the permit as overly burdensome, either administratively or in state court, they did not do so. *See* N.Y. Comp. Codes R. & Regs. tit. 6, §§ 624.1-624.13 (2006). Rather, the only challenge came from the Private Party Respondents, who claimed the permit was too permissive. It seems that Petitioners' only real complaint with the permitting process is the fear that the exemption that they now benefit from might someday be taken away. The time to complain about that eventuality, however, is if and when it comes to pass.

In addition, this Court itself recognized Pennsylvania's long-standing NPDES program to regulate all interbasin transfers. 541 U.S. at 108-09. And the one other court to specifically address the issue of permit flexibility in this context squarely agreed with the Second Circuit. *See Friends of the Everglades*, 2006 WL 3635465, at *46.

For their part, the Petitioners make no effort to review the adverse impacts associated with certain interbasin transfers of water containing pollutants: Salt water could be transferred into fresh water; sediment-laden water could be sent into clear drinking water reservoirs; warm waters could be pumped into cold water habitats; chemical laden waters could be dumped into waters employed in farm and ranch irrigation; and invasive species could be transferred into waters not yet infested. Petitioners do not explain how leaving such transfers unregulated by NPDES permits would be consistent with the fundamental "objective" of the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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